Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?

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Introduction

Jurisdiction. The word is a term of large and comprehensive import, and embraces every kind of judicial action.[1]

With jurisdiction serving as the cornerstone of any military court,[2] the importance of understanding and being familiar with the latest cases and legislation in this area should not be underestimated. The past year saw passage of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA),[3] as well as several important decisions from the Court of Appeals for the Armed Forces (CAAF). Although the legislation and cases may have only minor effects on the jurisdictional landscape in the military, they could very well be an indication of bigger things to come.

The CAAF decided several cases involving jurisdictional issues that had been decided at the service court level the previous year. While the CAAF affirmed the lower courts' decisions in some of these cases, there were those cases where the decision of the lower court was set aside. This article discusses these decisions within the framework of the prerequisites of military jurisdiction. The five necessary prerequisites of court-martial jurisdiction are found in Rule for Courts-Martial (RCM) 201(b): (1) the court-martial must be convened by a proper official; (2) the military judge and members must be of proper number and qualifications; (3) the charges must be referred to the court-martial by competent authority; (4) there must be jurisdiction over the accused; and (5) there must be jurisdiction over the offense.[4] The decisions handed down this past year address several of these elements. The first two parts of this article will look at those decisions addressing properly composed courts and properly referred charges. The third part will review those decisions addressing personal jurisdiction. The fourth and fifth parts will discuss appellate jurisdiction and recent legislation, respectively.

A Properly Composed Court-Martial: Substantial Compliance

The second element needed to perfect court-martial jurisdiction is a properly composed court. Rule for Courts-Martial 201(b)(2) requires that a court-martial be composed in accordance with the rules addressing the right number and qualifications of the members and the military judge.[5] Article 16 of the Uniform Code of Military Justice (UCMJ) allows for a court-martial without any members (military judge alone),[6] while Article 25, UCMJ, allows for enlisted members to serve on courts-martial.[7] In 1997, the CAAF held in *United States v. Turner*[8] that there was a violation of Article 16 where the accused had not *personally* made the request for a military

1. BLACK'S LAW DICTIONARY 443 (5th ed., abr. 1983) [hereinafter BLACK'S].

2. *See* Major Martin H. Sitler, *The Court-Martial Cornerstone: Recent Developments in Jurisdiction,* ARMY LAW., Apr. 2000, at 2.

3. 18 U.S.C. §§ 3261-3267 (2000).

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (2000) [hereinafter MCM].

5. *Id.* R.C.M. 201(b)(2) ("The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here 'personnel' includes only the military judge, the members, and the summary court-martial.").

6. Article 16(1) states that a court-martial may consist of "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, *requests orally on the record or in writing* a court composed only of a military judge and the military judge approves." UCMJ art. 16(1)(B) (2000) (emphasis added).

7. Article 25(c)(1) states:

> Any enlisted member of an armed force on active duty is eligible to serve on general and special courts-martial for the trial of any enlisted member . . . only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, *the accused personally has requested orally on the record or in writing* that enlisted members serve on it.

UCMJ art. 25(c)(1) (emphasis added).

8. 47 M.J. 348 (1997). In *Turner*, the accused had been advised by the military judge of his choice of forum at arraignment. The accused's defense counsel later submitted a written request for trial by military judge alone, and the defense counsel confirmed that request orally at trial in the accused's presence. *Id.* at 349.

judge alone either orally or in writing. However, the court decided there had been substantial compliance with Article 16 and that the error did not materially prejudice the substantial rights of the accused. The court looked to the history behind Article 16 and regarded the error as procedural and not jurisdictional.[9]

In 1999, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Townes*, a case which focused on Article 25.[10] In *Townes*, the military judge advised the accused at the initial Article 39(a) session of his right to be tried by a court-martial composed of at least one-third enlisted members.[11] The accused stated that he understood this right. At a later session, in the presence of the accused, the defense counsel orally requested enlisted members to serve on the panel.[12] At no time did the accused personally request orally or in writing that enlisted members serve on the panel, as required by Article 25.[13] On appeal, the accused challenged the jurisdiction of the court. The NMCCA ordered a *DuBay* hearing,[14] at which the accused testified that he "did not recall" if he desired to be tried by enlisted members.[15] Following the *Dubay* hearing, the NMCCA found the military judge's failure to obtain from the accused personally (either orally or in writing) his election of enlisted members to be jurisdictional error. Relying on *United States v. Brandt*,[16] the court held that this election had to be made *personally* by the accused; his counsel could not make the election for him.[17] In so holding, the court distinguished Article 25 (which uses the language "*personally*") from Article 16 (which omits the word "personally").[18]

This past year the CAAF set aside the NMCCA decision in *Townes*.[19] The court reviewed the legislative history and found that "both Article 16 and Article 25 require personal election by the accused as to the forum," thus making the NMCCA distinction immaterial.[20] The CAAF also held that the military judge erred in not obtaining, on the record, the accused's personal request for enlisted members.[21] However, this error was not deemed jurisdictional because there was sufficient indication by the accused orally and on the record that he personally requested enlisted members.[22] The court held that there was substantial compliance with Article 25 and, as in *Turner*, the error did not materially prejudice the substantial rights of the accused.[23] With this decision, the "substantial compliance" doctrine now extends to Article 25. It is worth noting that although the trend is to treat failures to comply with the rules regarding court-martial composition as technical errors and not jurisdictional errors, in both *Turner* and *Townes* the CAAF reminded judges of their duties to obtain personal election on the record from accuseds.[24]

Properly Referred Charges

The third requirement for court-martial jurisdiction is that "[e]ach charge before the court-martial must be referred to it by competent authority."[25] This is usually not a jurisdictional element that generates much litigation, but the Army Court of Criminal Appeals (ACCA) recently addressed this requirement in *United States v. Pate*.[26] Specialist Pate had been originally charged with violating Article 92(2), UCMJ, failure to obey a

9. *Id.* at 350.

10. 50 M.J. 762 (N-M. Ct. Crim. App. 1999).

11. *Id.* at 763.

12. *Id.*

13. *See supra* notes 6-7.

14. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

15. *Townes*, 50 M.J. at 764.

16. 20 M.J. 74 (C.M.A. 1985).

17. *Townes*, 50 M.J. at 765.

18. *See supra* note 6-7.

19. 52 M.J. 275 (2000).

20. *Id.* at 276.

21. *Id.*

22. *Id.* at 277.

23. *Id.* at 276.

24. United States v. Turner, 47 M.J. 348, 350 (1997); *Townes*, 52 M.J. at 277.

lawful order, but at trial he pled guilty by exceptions and substitutions to Article 92(3), UCMJ, negligent dereliction of duty.[27] His plea of guilty by exceptions and substitutions was made pursuant to a pretrial agreement, which the convening authority had not personally signed.[28] Instead, both the offer portion and the quantum portion of the pretrial agreement had the word "accepted" circled and then a notation reading: "VOCO to . . . Staff Judge Advocate, 15 Oct 98 0900 hrs."[29] Neither the military judge nor the counsel for either side commented at trial on the lack of the convening authority's signature.[30]

One argument advanced on appeal by the accused was that because the convening authority had not signed the pretrial agreement, the offense of dereliction of duty was never referred and, therefore, the court did not have jurisdiction over that offense.[31] The ACCA disagreed, holding that the convening authority could accept the pretrial agreement without signing it. The court looked beyond the lack of the convening authority's signature. It found the pretrial agreement valid and held that acceptance of the pretrial agreement constituted a referral of the new offense, stating that "the form of the referral is not jurisdictional."[32] The court referred to RCM 601(e), which provides that a referral "shall be by the personal order of the convening authority."[33] The court stated that, "[t]he rule does not require a referral to be in writing, nor does the rule require a signature."[34]

Unlike *Turner* and *Townes*, the court in *Pate* was not contending with a technical departure from the rules; the rule was found to have been satisfactorily met. However, the service court's decision seems to be of the same essence as the CAAF's decisions in *Turner* and *Townes*. That is, when determining jurisdictional issues, it is not so much the technical adherence to the rule that matters, but rather, the pragmatic effect resulting from application of the rule.[35]

Personal Jurisdiction: When Is a Discharge Effective?

The fourth element of court-martial jurisdiction is that "[t]he accused must be a person subject to court-martial jurisdiction."[36] This element of jurisdiction, commonly referred to as personal jurisdiction, requires that an accused occupy a status as a person subject to the UCMJ at the time of trial.[37] Generally, this military status begins at enlistment and ends at discharge.[38] A discharge is complete upon: 1) a delivery of a valid discharge certificate; 2) a final accounting of pay; and 3) undergoing a clearing process required under appropriate service regulations to separate a servicemember from military service.[39] In 1999, the service courts decided two cases that visited the issue of

25. MCM, *supra* note 4, R.C.M. 201(b)(3). The discussion section of the rule refers the reader to R.C.M. 601, which provides for rules governing referral of charges. *Id.* discussion.

26. 54 M.J. 501 (Army Ct. Crim. App. 2000).

27. *Id.* at 503. The accused was entering Larson Barracks, in Kitzingen, Germany, and failed to stop for the gate guards. The act of driving through the gate after being directed to stop was charged as a violation of Article 92(2), failure to obey a lawful order. Pursuant to a pretrial agreement, the accused pled guilty by exceptions and substitutions to a violation of Article 92(3), negligent dereliction of duty by failing to remain stopped at the gate until he was allowed to proceed. *Id.*

28. *Id.*

29. *Id.* VOCO is commonly used shorthand that stands for "Vocal Communication."

30. *Id.*

31. *Id.* A convening authority's entry into a pretrial agreement is the functional equivalent of an order that the uncharged offenses in the pretrial agreement be referred to the court-martial for trial. United States v. Wilkins, 29 M.J. 421, 424 (C.M.A. 1990). The accused contended that the pretrial agreement was never signed and, therefore, the convening authority never properly referred that uncharged offense to trial. *Pate*, 54 M.J. at 504.

32. *Id.*

33. MCM, *supra* note 4, R.C.M. 601(e)(1).

34. *Pate*, 54 M.J. at 504. The court stated that "if the convening authority issued an order—however informal, oral or written—that a charge . . . be tried by the same court-martial which ultimately entered the findings of guilty, then jurisdiction existed to enter findings on that charge." *Id.* (quoting *Wilkins*, 29 M.J. at 424).

35. This is certainly not to say that practitioners can ignore the rules. Judges, counsel, staff judge advocates, and convening authorities need to be mindful of and follow the procedural requirements contained in the Rules for Courts-Martial.

36. MCM, *supra* note 4, R.C.M. 201(b)(4).

37. *See id.* R.C.M. 202(c) discussion.

38. *See id.* R.C.M. 202(a) discussion.

39. *See* 10 U.S.C. §§ 1168-1169 (2000); United States v. Keels, 48 M.J. 431, 432 (1998); United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).

when a discharge becomes effective.[40] Both cases were affirmed by the CAAF this year and warrant some discussion.

In *United States v. Melanson*,[41] whether military jurisdiction existed depended on the *hour* at which the discharge became effective. On 10 May 1998, a noncommissioned officer (NCO) had been badly assaulted outside a nightclub in Vilseck, Germany, but was unable to identify his attackers.[42] While Military Police Investigations (MPI) was investigating the case, the accused was being administratively separated for drug use under *Department of the Army Regulation (AR) 635-200*, paragraph 14-12c.[43] His separation orders reflected a discharge date of 20 May.[44] He completed his administrative outprocessing on 19 May, received a copy of his DD Form 214 (Certificate of Release or Discharge from Active Duty), and on 20 May at 0008 hours, he signed out of his unit and was escorted to a nearby airport where he flew to Frankfurt.[45] Meanwhile, later on 20 May, two eyewitnesses identified the accused in a photographic lineup (on 20 May) as one of those who had assaulted the NCO on 10 May. Based on this identification the company commander directed military law enforcement to stop the accused from boarding his flight in Frankfurt.[46] Later that day, at 1800 hours, the brigade commander revoked the accused's administrative separation.[47]

The ACCA looked at the three elements required to effectuate a discharge and found that jurisdiction had not terminated.[48] The court stated that "for soldiers stationed overseas, the process of separating from the Army includes compliance with all treaty obligations."[49] The North Atlantic Treaty Organization status of forces agreement requires the United States to remove service members from the host nation and return them to the United States.[50] The service court held that the accused was required to be repatriated to the United States and was, therefore, still a member of the United States Army until that was accomplished.[51] The court also agreed with the military judge's finding that copy 4 of the accused's DD Form 214 did not equal a discharge certificate and determined he had also been unable to satisfy the "delivery of a discharge" element.[52] And while the court found it unnecessary to address the "final accounting of pay" element, it did mention in a footnote that "current technology and accounting practices may have changed the analysis necessary for determining when a final accounting of pay has occurred."[53]

Although the CAAF affirmed *Melanson*, it found a different basis for doing so. The court looked at *AR 635-200*, paragraph 1-31d, which states that "a discharge takes effect at '2400 [hours] on the date of notice of discharge to the soldier.'"[54] Based on this regulation, the court held that an administrative discharge is not effective until 2400 hours on the date of notice

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40. United States v. Williams, 51 M.J. 592 (N-M. Ct. Crim. App. 1999); United States v. Melanson, 50 M.J. 641 (Army Ct. Crim. App. 1999). These cases were discussed extensively in last year's jurisdiction article as service court decisions. *See* Sitler, *supra* note 2, at 4.

41. 53 M.J. 1 (2000).

42. *Melanson*, 50 M.J. at 642. The service court opinion provides greater detail and will be cited for purposes of laying out some of the facts of this case.

43. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION: ENLISTED PERSONNEL, para. 14-12c (5 July 1984) (C14, 17 Oct. 1990), *superseded by* U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION: ENLISTED PERSONNEL (1 Nov. 2000).

44. *Melanson*, 50 M.J. at 643.

45. *Id.* He was given copy 4, a courtesy copy, of his DD Form 214. The original discharge certificate, copy 1, was to be mailed to the service member within five days of the date of his discharge. *Melanson*, 53 M.J. at 3.

46. *Melanson*, 50 M.J. at 643. The accused was making a connecting flight in Frankfurt to Washington, D.C., and was taken into custody by German polizei at the request of the military police investigators. *Id.*

47. *Melanson*, 53 M.J. at 3.

48. *Melanson*, 50 M.J. at 644. The three elements being: (1) delivery of a discharge, (2) final accounting of pay, and (3) undergoing the clearing process.

49. *Id.*

50. *Id.* (citing Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter NATO SOFA Supplementary Agreement]).

51. *Id.* Thus, the service court held that the accused failed to satisfy the element requiring completion of the clearing process.

52. *Id.* at 645.

53. *Id.* at 645 n.6.

54. *Melanson*, 53 M.J. at 2 (quoting U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATION: ENLISTED PERSONNEL, para. 1-31d (5 July 1984) (C15, 26 June 1996)).

of discharge to the soldier, absent a clear showing of an intent to discharge a service member at an earlier time.[55] The military, therefore, did not lose jurisdiction over the accused because the discharge was withdrawn at 1800 hours, prior to the effective time of the discharge—2400 hours. The "delivery of a valid discharge" element was not satisfied, so the court declined to decide whether the military judge and the service court were correct in concluding that jurisdiction would have continued based upon the issues of overseas clearance procedures and accounting of pay.[56]

A similar situation presented itself in *United States v. Williams*.[57] In *Williams*, the accused was evaluated by a physical evaluation board (PEB) due to a back injury and was determined to be unfit for duty.[58] On 18 December 1996, the accused went home on terminal leave awaiting final disposition of his medical discharge.[59] Meanwhile an investigation into fraudulent military identification cards had focused on the accused.[60] On 15 January 1997, his command placed him on legal hold. However, without the knowledge of the commander, the accused's previously prepared DD Form 214 was mailed to the accused's mother-in-law's residence, arriving there on 16 January.[61] The accused had also received his final pay and accounting by direct deposit on 15 January.[62] He then received orders dated 17 January 1997 terminating his previous PEB orders and directing him to return to duty. The accused reported for duty on 22 January.[63]

On appeal, the accused argued that the legal hold was ineffective since his DD Form 214 was effective on 15 January and, therefore, he was already discharged at the time the legal hold was placed on him.[64] The service court disagreed and held that jurisdiction never terminated. It found that the effective time of the orders (as entered on his Separation/Travel Pay Certificate) was 2359 hours.[65] The CAAF reviewed the case this year and in a short opinion found that the accused was indeed placed on legal hold prior to "the expiration of the date that constitute[d] the effective date of the discharge."[66] The CAAF agreed with the service court that the discharge had been properly rescinded thus maintaining personal jurisdiction over the accused.[67]

The rule to be taken from the CAAF decisions in *Melanson* and *Williams* seems to be a simple, and yet a very important one—military jurisdiction remains up until the very moment, even the very second, that a discharge becomes effective. And the discharge does not become effective until the *expiration* of the effective date.[68] So even if all three elements are satisfied, as was the case in *Williams*, personal jurisdiction continues to the very end.[69] In the words of the imortal Yogi Berra: "It ain't over till it's over."[70]

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55. *Id.* at 4.

56. *Id.*

57. 53 M.J. 316 (2000).

58. *Id.* at 317.

59. *Id.*

60. United States v. Williams, 51 M.J. 592, 594 (N-M. Ct. Crim App. 1999). The service court opinion provides additional detail and is cited for purposes of laying out some of the facts of this case.

61. *Id.* The discharge dated annotated on the DD Form 214 was 15 January 1997. *Id.*

62. *Williams*, 53 M.J. at 317.

63. *Williams*, 51 M.J. at 594.

64. *Id.* at 595.

65. *Id.* The service court determined that the accused's discharge was to take effect on 15 January 1997 at 2359 hours based upon the entry appearing in the pay information block of the accused's Separation/Travel Pay Certificate of 9 January 1997 which read: "SNM HAO EFF [service member home awaiting orders effective] 1630/961218 - 2359/970115." *Id.* at n.3 (emphasis added).

66. *Williams*, 53 M.J. at 317.

67. *Id.*

68. The question of *what time of day* the discharge takes effect is not a new one. *See* United States v. Self, 13 M.J. 132 (C.M.A. 1982); United States v. Smith, 4 M.J. 265 (C.M.A. 1978) (holding that the discharge became effective at 12:01 a.m., or one minute after midnight on the date specified on the self-executing orders); United States v. Brown, 31 C.M.R. 279 (C.M.A. 1962) (holding that orders relieving the accused from active duty became effective the moment they were received by him). The rule that a discharge is not effective until the end of the date specified may not apply in all situations.

69. It must still be remembered that the three elements necessary to effectuate a discharge operate under the assumption that the effective date on the DD Form 214 (or other orders stating the date of discharge) has arrived.

Turning to another recent CAAF decision that addressed the element of personal jurisdiction, *United States v. Wilson*[71] examined the question of how a *state* discharge from the National Guard affects *federal* jurisdiction. In *Wilson*, the accused was a member of the California Air National Guard (ANG) and was ordered to active duty on 21 July 1995 for a period of ninety-eight days (27 July through 1 November).[72] On 18 October he stole $320 from a fellow airman and then on 19 October he left his unit without authority. He remained absent without authority for over a year, until he was apprehended on 30 November 1996.[73] Meanwhile, on 3 November 1995, during his unauthorized absence, the California ANG issued an order extending his active duty orders, "by order of the Secretary of the Air Force," to 31 December 1995 (an additional sixty days).[74] Sometime in May 1996, the ANG unit personnel clerk completed a DD Form 214 and mailed it to the accused's home of record, purportedly discharging the accused.[75]

On appeal the accused argued lack of in personam jurisdiction since he had already been given his DD Form 214. The CAAF disagreed, holding that the discharge was invalid.[76] However, the court indicated that the validity of the discharge was not the central focus in the case. It found that the accused was placed on active federal service for a period of 158 days (including the extension) and that his unauthorized absence suspended the terminal date of his orders.[77] Until he completed his term of federal service, he remained subject to military jurisdiction. The state had no authority to unilaterally terminate his period of federal service, so any actions to discharge the accused by state officials did not affect his federal active duty status.[78]

Wilson provides a helpful analysis in determining when court-martial jurisdiction exists over a member of the National Guard. The jurisdictional relationship between the active component, the reserve component, and the National Guard is confusing for many and sometimes can be difficult to apply. *Wilson* emphasizes the distinction between state status and federal status, and the importance of understanding when federal status begins and when federal status ends. Once an individual is placed into federal status, they remain in federal status until they complete their term of federal service.

The last case addressing personal jurisdiction in the past year is *United States v. Byrd*.[79] This case focuses on the concept of "continuing jurisdiction." This is the concept that military jurisdiction continues over an accused even after a valid discharge, but applies for the limited purpose of executing the sentence and completing appellate review of a case.[80] Over the past three years there have been several cases that have helped refine this concept.[81] Continuing jurisdiction starts after a conviction occurs, and continues through the entire appellate process, notwithstanding an intervening administrative discharge or even the execution of a punitive discharge.[82] But once the appellate process is completed and the punitive discharge is executed, does this not terminate military jurisdiction? This was the question addressed in *Byrd*.

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70. Yogi Berra, professional baseball manager, as 1973 manager of the New York Mets, quoted by William Safire, *On Language*, N.Y. TIMES, Feb. 15, 1987, at F8, *available at* LEXIS, News, Major Newspapers File.

71. 53 M.J. 327 (2000).

72. *Id.* at 330.

73. *Id.* at 331.

74. *Id.* at 330. Altogether the accused had an active duty service obligation of 158 days.

75. *Id.* at 331. Apparently, a master sergeant took it upon himself to remove the accused from the unit rolls and then later prepare the separation orders, the DD Form 214 (checking the block providing for an "other than honorable" discharge), and the National Guard Bureau Form 22 (Report of Separation and Record of Service). The court found the state discharge invalid. However, it would have found that military jurisdiction existed even if the state discharge had been valid. *Id.* at 331-33.

76. *Id.* at 333.

77. *Id.* at 332.

78. *Id.* at 333. The CAAF stated, "[t]he discharge documents issued by the California ANG had no effect on the authority of the federal government to retain jurisdiction over appellant until he was relieved by federal authorities form his federal duties." *Id.*

79. 53 M.J. 35 (2000).

80. *See* Smith v. Vanderbush, 47 M.J. 56, 59 (1997).

81. *See generally* Steele v. Van Riper, 50 M.J. 89 (1999); Willenbring v. Neurauter, 48 M.J. 152 (1998); *Vanderbush*, 47 M.J. at 56.

82. *See Van Riper*, 50 M.J. at 89 (an honorable discharge after a court-martial conviction does not affect the power of the convening authority or appellate courts to act on the findings and sentence, however, it supersedes any adjudged punitive discharge); *Vanderbush*, 47 M.J. at 56 (the accused had been arraigned but was administratively discharged before trial; the CAAF refused to extend the concept of continuing jurisdiction to pretrial cases); *see also* United States v. Stockman, 50 M.J. 50 (1998); United States v. Engle, 28 M.J. 299 (1989) (execution of a discharge does not deprive the appellate court of jurisdiction to grant a petition for review).

In *Byrd*, the NMCCA had affirmed the accused's conviction and sentence on 15 October 1996.[83] The accused did not petition CAAF for review until 22 January 1997. However, on 2 January 1997, the accused's punitive discharge was ordered executed pursuant to Article 71(c), UCMJ, and the accused was issued his DD Form 214.[84] The CAAF granted the petition on 10 June 1997 and, following oral argument, set aside the NMCCA decision.[85] On remand to the service court, the government for the first time raised the fact that the punitive discharge had already been executed.[86] On 8 April 1999, the NMCCA held that the executed discharge terminated jurisdiction, stating that the accused's untimely filing resulted in the execution of his punitive discharge and the loss of his right to appeal.[87]

The CAAF disagreed with the NMCCA, vacating the service court's decision on 17 May 2000. The court held that jurisdiction still existed. The court found that the government had failed to establish the untimeliness of the petition because there was nothing in the record to clearly and properly indicate when the sixty-day review clock actually started. The execution of the discharge was premature and, therefore, the NMCCA erred in concluding that the accused was properly discharged under Article 71(c).[88]

More importantly, however, is the court's discussion of the effect a properly executed discharge might have upon the jurisdiction of the court. It makes two major points. First, the court makes clear that the statute, Article 67, UCMJ, and the court rule, Rule 19, Rules of Practice and Procedure for the CAAF,[89] which both provide for a sixty-day time limit to appeal to the CAAF, are *not* jurisdictional.[90] Second, it stated that even a proper execution of a punitive discharge under Article 71 does not deprive the court of jurisdiction to grant a petition for review.[91] Finally, the court concludes with a significant discussion of the certified question.[92] The discussion leaves little speculation as to whether the concept of continuing jurisdiction extends beyond the execution of the punitive discharge. The government acknowledged that the CAAF would have jurisdiction when there is good cause for an untimely filing under the All Writs Act.[93] But does the court have actual jurisdiction under direct review to hear such a case? This is the only real question remaining and the court declined to answer it for now.[94]

To summarize, this case leaves the parameters of continuing jurisdiction somewhat more defined. *Vanderbush* provides a beginning—continuing jurisdiction starts when there is a conviction. And now *Byrd* provides an indication of where continuing jurisdiction might finally terminate—it continues through the appellate process until judicial action is complete,

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83. *Byrd*, 53 M.J. at 38.

84. *Id.* at 39. Article 71(c) provides in part:

> that part of the sentence extending to . . . a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings . . . . A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and -- (A) *the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review* and the case is not otherwise under review by that Court.

UCMJ art. 71(c)(1) (2000) (emphasis added). Article 67(b) provides the accused with sixty days from the date on which the accused is actually notified of the service court's decision or the date the decision is sent by certified mail to the accused (providing it was also served on appellate defense counsel), whichever occurs earlier, to file a petition for review. *Id.* art. 67(b).

85. *Byrd*, 53 M.J. at 38. The CAAF was unaware that the punitive discharge had been executed.

86. *Id.* at 39.

87. United States v. Byrd, 50 M.J. 754, 758 (1999).

88. *Byrd*, 53 M.J. at 41. The sixty-day review clock starts with either actual service of notice to the accused or constructive service of notice to the accused. *See* UCMJ art 67(b); *see also* discussion at *supra* note 84. There was no proof of actual service of notice and the CAAF found, with respect to constructive service, that the record failed to include "a number of basic documents that would have facilitated clear calculation of the beginning of the sixty-day period." *Byrd*, 53 M.J. at 40.

89. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, RULES OF PRACTICE AND PROCEDURE R. 19 (1999), *available at* http://www.armfor.uscourts.gov/Rules.pdf.

90. *Byrd*, 53 M.J. at 38. The court viewed the sixty-day time period as nonjurisdictional, emphasizing that procedural time frames may be waived in the interests of justice. *Id.*

91. *Id.* The court stated: "We have emphasized that an untimely petition may be considered upon a showing of good cause for the late filing, *even where a punitive discharge already had been executed upon the running of the 60-day appeal.*" *Id.* (emphasis added). The court cites to *United States v. Engle*, 28 M.J. 299 (1989), for this authority.

92. The question certified for appeal was: Whether proper execution of appellant's punitive discharge in accordance with Article 71(c), UCMJ, made appellant's case final under Article 76, UCMJ, and terminated military appellate court jurisdiction over the case. *Byrd*, 53 M.J. at 40 n.3.

93. 28 U.S.C. § 1651(a) (2000). For a discussion of appellate jurisdiction and the All Writs Act see infra notes 97-137 and accompanying text.

even if that means going beyond the execution of the punitive discharge. When is judicial action complete? That may be when the sentence is executed, time has run on all appeals, and good cause for a late filing cannot be shown.[95]

Appellate Jurisdiction: The Aftermath of *Clinton v. Goldsmith*

The authority for appellate jurisdiction is derived generally from one of two sources: direct review of cases pursuant to Articles 62, 66, 67, 67a, and 69, UCMJ,[96] or collateral review of issues under authority of the All Writs Act.[97] Congress enacted the All Writs Act in 1948 providing all federal appellate courts with authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions."[98] The Supreme Court has determined that the All Writs Act applies to the military appellate courts.[99] Under this Act, the military appellate courts are able to grant relief within their respective jurisdictions by way of extraordinary writ authority.[100] However, writ relief is viewed by appellate courts as a drastic remedy that should be used sparingly and invoked only in truly extraordinary situations.[101]

The scope of appellate jurisdiction would seem rather definitive given these principles, and yet the decision by the Supreme Court in *Goldsmith* has injected some uncertainty into the parameters of appellate jurisdiction. Following a steady expansion of involvement by way of the All Writs Act, the CAAF was finally reigned in by the Supreme Court in 1991. In *Goldsmith*, an Air Force major was convicted at court-martial and sentenced to six years confinement, but no punitive discharge.[102] The Air Force proceeded to drop him from the rolls pursuant to a recent statute authorizing such action in the case of any officer who had been sentenced to more than six months confinement.[103] Goldsmith petitioned the military appellate courts for extraordinary relief under the All Writs Act, challenging the Air Force's action as violating the *Ex Post Facto* Clause of the Constitution.[104] The CAAF granted his petition and enjoined the government from dropping him from the rolls. The Supreme Court granted certiorari and reversed, finding that the CAAF lacked jurisdiction.[105] The Supreme Court held that "the CAAF is not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice."[106] It emphasized the important fact that the All Writs Act does not enlarge a court's jurisdiction, but rather, it authorizes the use of extraordinary writs within the confines of its existing jurisdiction.[107] Looking to Article 67(c), UCMJ, for the limits

94. The court concluded as follows:

> If, in the future, we receive a petition in which there is clear and unequivocal evidence of untimeliness, and the issue of good cause for a late filing is raised, we shall consider at that time whether it is appropriate to consider the case under the standards applicable t o direct review or the standards applicable to collateral review.

Byrd, 53 M.J. at 41.

95. It is worth noting that eventually, even continuing jurisdiction in the military must terminate. Although it is uncertain at what point that termination actually occurs, the Supreme Court stated in *Clinton v. Goldsmith*, 526 U.S. 529, 536 (1999), that "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review."

96. Article 62 addresses appeals by the government. Article 66 addresses appellate review by the service courts. Article 67 discusses appellate review by the CAAF. Article 67a discusses review by the Supreme Court. Article 69 discusses review by the different services' judge advocates general.

97. 28 U.S.C. § 1651(a).

98. *Id.* § 1651(a). The four writs commonly used in the military courts are mandamus, prohibition, error coram nobis, and habeas corpus.

99. *See* Noyd v. Bond, 395 U.S. 683 (1969).

100. The All Writs Act does not create jurisdiction; rather, it provides the appellate court with the ability to grant extraordinary relief within the statutory jurisdiction it already possesses. In addition to the actual jurisdiction that an appellate court has under Articles 66 and 67, UCMJ, the All Writs Act provides extraordinary writ authority which enables the court to exercise its ancillary, potential, or supervisory jurisdiction. *See* Dew v. United States, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998). Ancillary jurisdiction is the authority to determine matters incidental to the court's exercise of its primary jurisdiction. BLACK's, *supra* note 1, at 45. Potential jurisdiction is the authority to determine matters that may reach the actual jurisdiction of the court. Supervisory jurisdiction is the broad authority of a court to determine matters that fall within the supervisory function of administering military justice. *See generally Dew*, 48 M.J. at 645-50.

101. *See* United States v. Labella, 15 M.J. 228 (C.M.A. 1983); Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989).

102. Clinton v. Goldsmith, 526 U.S. 529, 531 (1999).

103. *Id.* at 532.

104. *Id.* at 533. The *Ex Post Facto* Clause is found in Article I, Section 9 of the U.S. Constitution.

105. *Goldsmith*, 526 U.S. at 533.

106. *Id.* at 536.

of that jurisdiction, the Supreme Court stated, "the CAAF has the power to act 'only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."[108] The issue in *Goldsmith* was not related to his court-martial sentence, it was an administrative action separate and apart from his court-martial.[109] How has the *Goldsmith* decision affected the use of the All Writs Act by the military appellate courts? A discussion of several cases decided by the military courts since *Goldsmith* may help answer this question.

One such case, *United States v. Byrd*, has already been discussed at length in this article.[110] As previously mentioned, the CAAF determined that the execution of the punitive discharge pursuant to Article 71, UCMJ, had been premature since the accused's petition to the CAAF was considered timely. However, assuming a proper expiration of the sixty-day period in which to petition for review, the execution of the punitive discharge would have been valid.[111] In such a post-punitive discharge scenario, the CAAF said it would still have jurisdiction but declined to address the issue of whether to exercise that jurisdiction under direct review or with the aid of the All Writs Act.[112] This holding may need additional explaining in light of the Supreme Court's decision in *Goldsmith*, in which Justice Souter wrote, "there is no source of continuing jurisdiction for the CAAF over all actions administering sentences that the CAAF at one time had the power to review."[113] The CAAF has not yet conceded when the termination of appellate jurisdiction occurs, but as already discussed, even under the All Writs Act, it must eventually end.[114]

Two other cases involving the use of the All Writs Act since the *Goldsmith* decision warrant brief discussion. The first is *United States v. King*.[115] *King* is an ongoing case that has bounced between the convening authority, the NMCCA, and the CAAF since 1999.[116] The accused is facing espionage charges involving classified materials. He was represented by two military counsel and a civilian defense counsel, of which only one military counsel had the security clearance necessary to obtain access to relevant information.[117] On 2 March 2000, prior to the Article 32, UCMJ, pretrial investigation, the convening authority imposed certain restrictions on the communications between the accused and his defense counsel to "monitor the information disclosed and to ensure that no unauthorized disclosures took place."[118] The accused petitioned the NMCCA for extraordinary relief but, based on the holding in *Clinton v. Goldsmith*, the court denied relief.[119] On appeal of the petition to the CAAF, the accused was granted a stay of the Article 32 proceedings. In a concurring opinion, Judge Sullivan stated that the NMCCA "was clearly wrong in denying relief under *Clinton v. Goldsmith*. They had power to issue relief under the All Writs Act. Moreover, this Court clearly has the power to supervise criminal proceedings under Article 32."[120] The CAAF message to the NMCCA seems to be not to apply *Goldsmith* too broadly.

The second case involving use of the All Writs Act, *Ponder v. Stone*,[121] would indicate the NMCCA heard the message from CAAF. In *Ponder*, the accused was charged with willfully disobeying a lawful order from a superior commissioned officer.[122] He petitioned the NMCCA for extraordinary relief under the

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107. *Id.* at 534.

108. *Id.*

109. *Id.* at 535.

110. *See supra* notes 79-94 and accompanying text.

111. *Id.*

112. *See supra* note 94.

113. *Goldsmith*, 526 U.S. at 536.

114. *See supra* note 95 and accompanying text.

115. No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000).

116. The accused was placed in pretrial confinement on 29 October 1999 on suspicion of espionage. Charges were preferred on 5 November 1999. The CAAF addressed issues between 16 March 2000 and 19 September 2000. The NMCCA addressed issues between 24 October 2000 and 26 January 2001. The case is still in the early stages of criminal litigation. *See* King v. Ramos, No. NMCM 200001991 (N-M. Ct. Crim. App. Jan. 26, 2001) (unpublished).

117. *Id.*

118. *Id.*

119. *King*, No. 00-8007/NA, 2000 CAAF LEXIS 321.

120. *Id.* (citations omitted).

121. 54 M.J. 613 (2000).

All Writs Act alleging error by the military judge in a ruling at trial.[123] The government argued that the NMCCA lacked jurisdiction to entertain the accused's petition. In relying on *Goldsmith*, the government argued that the service court could "only grant extraordinary relief on matters affecting the findings and sentence of a court-martial."[124] The NMCCA disagreed, stating that such an interpretation of *Goldsmith* was overbroad. The petition involved a judicial action, and it fell within the jurisdiction the court was given to supervise and oversee actions of its inferior courts.[125] Relying on the All Writs Act, the court held that it could properly review the petition since it was a matter in aid of its jurisdiction.[126] There is no doubt the CAAF will agree with this holding. One need only look to the *King* case for confirmation.

The last case addressing appellate jurisdiction is *United States v. Sanchez.*[127] In *Sanchez*, the CAAF addressed an issue regarding the Eighth Amendment to the United States Constitution and Article 55, UCMJ. The accused was sentenced to one-year confinement at the Naval Consolidated Brig Miramar, during which time she was the subject of verbal sexual harassment from military guards and other inmates.[128] After her release from confinement, she claimed the harassment amounted to cruel and unusual punishment, in violation of both the Eighth Amendment and Article 55.[129] The Air Force Court of Criminal Appeals affirmed the findings and sentence and held it was without jurisdiction to entertain the accused's claim for sentence relief because her claim was based upon "post-trial sexual harassment."[130] The CAAF affirmed the findings and sentence but disagreed on the lack of jurisdiction issue. In a concurring opinion, Judge Gierke wrote that "[b]y deciding the merits of the issue, th[e] Court ha[d] *sub silentio* asserted its jurisdiction."[131] In distinguishing the case from *Goldsmith*, he stated that the case was in front of CAAF on *direct review*, and did not involve the All Writs Act, because the issue fell under Article 67.[132] Similarly, Judge Sullivan viewed unlawful post-trial punishment as "a matter of law related to 'the review of specified sentences imposed by courts-martial' under Articles 66 and 67, UCMJ."[133] In his opinion, sexual harassment is not a lawful punishment under the UCMJ, was not adjudged at the accused's court-martial, and is "unquestionably a matter of codal concern."[134]

Sanchez, easily distinguished from *Goldsmith*, reaffirms the jurisdiction of the appellate courts in cases involving matters of military justice. Appellate jurisdiction does not extend just to the adjudged sentence at a court-martial; even post-*Goldsmith*, what may be arguably collateral in nature, may still be an issue for the appellate courts.[135] The trend from the cases cited above seems clear. Following the scolding of the Supreme Court, and in an abundance of caution, the service courts gave broad deference to the *Goldsmith* decision.[136] The CAAF reviewed the

122. *Id.* at 614. The accused refused to receive the anthrax vaccine.

123. *Id*. The accused argued that the military judge prevented him from introducing evidence that the anthrax vaccine was being used by the military in an inconsistent manner from that which the Food and Drug Administration intended. This, in turn, prevented him from presenting his affirmative defense that the order was unlawful. The military judge held that the legal authority on which the accused relied provided no individual legal rights enforceable at a court-martial. *Id.*

124. *Id.* at 615.

125. *Id*. at 615. The court stated, "[i]t would defy common sense, as well as a long-standing precedent of its own, if the Supreme Court truly intended to hold that our superior Court—and, by extension, this court— has no inherent authority to oversee the interlocutory actions of its inferior courts." *Id*.

126. *Id*. at 616. It should be emphasized that the issue of jurisdiction is the first consideration in deciding whether to grant relief under the All Writs Act. Once jurisdiction is established, the court can review a petition under the All Writs Act. However, the court must still decide whether relief is necessary or appropriate. *See supra* notes 97-100 and accompanying text.

127. 53 M.J. 393 (2000).

128. *Id.* at 394.

129. *Id.* The accused was released from confinement on parole. *Id.* Article 55 provides, in part, "cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." UCMJ art. 55 (2000).

130. *Sanchez*, 53 M.J. at 397.

131. *Id.*

132. *Id.* Article 67 provides for appellate review by the CAAF. UCMJ art. 67.

133. *Sanchez*, 53 M.J. at 397 (Sullivan, J., dissenting).

134. *Id*. at 398. Judge Sullivan quoted the following *Goldsmith* language as support: "It would presumably be an entirely different matter if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to specific provisions of the UCMJ . . . ." Clinton v. Goldsmith, 526 U.S. 529, 536 (1999).

135. *See also* United States v. Kinsch, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that jurisdiction exists where the court-martial is not final and the accused on direct appeal requests relief for cruel and unusual punishment that was not part of the adjudged and approved sentence)).

cases and reestablished the scope of appellate jurisdiction.[137] While it remains to be seen if the Supreme Court disagrees with the CAAF's application of its *Goldsmith* decision, that application provides important insight to military practitioners at all levels: actions of purely an administrative nature do not fall within the jurisdiction of the military courts, but all criminal matters are subject to consideration.

The Military Extraterritorial Jurisdiction Act of 2000[138]

When looking at all the developments that have occurred in the area of jurisdiction this past year, the MEJA has undoubtedly drawn the most attention, and yet it is probably the one area that raises more questions than answers.[139]

The MEJA was approved by Congress and signed into law by the President on 22 November 2000. Its purpose is to close a jurisdictional gap that has existed for some time. Civilians accompanying the military overseas are not subject to military jurisdiction unless during time of war.[140] Further, most federal criminal statutes do not apply outside the territory of the United States or the special maritime and territorial jurisdiction of the United States.[141] Therefore, civilians who committed crimes overseas could only be subjected to prosecution by the nation where the crime occurred. The problem arises when the foreign country declined to prosecute. The MEJA now expands the federal jurisdiction of the United States over civilians accompanying the military overseas.[142]

Who does the Act cover? The Act extends extraterritorial federal jurisdiction over civilians (except nationals or residents of the host nation) accompanying the U.S. Armed Forces or employed by the U.S. Armed Forces.[143] This language "accompanying the force" and "employed by the force" includes employees of the Department of Defense (including nonappropriated fund instrumentalities), contractors, subcontractors, employees of contractors or subcontractors, and any dependent of a military member or any dependent of one of the above.[144] It also extends federal jurisdiction to military members who have been discharged after commission of a covered offense.[145]

What does the Act cover? The Act applies to felony level offenses (punishable by more than one year in prison) that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."[146] One limitation to prosecution under this Act is if a foreign government, in accordance with jurisdiction

136. *See* United States v. King, No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000); *Sanchez*, 53 M.J. 393.

137. *See* Ponder v. Stone, 54 M.J. 613 (2000); *Kinsch*, 54 M.J. at 641.

138. 18 U.S.C. §§ 3261-3267 (2000).

139. See Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad - Problem Solved?*, ARMY LAW, Dec. 2000, at 1, for a more thorough discussion of the Act.

140. *See* UCMJ art. 2(a)(10)-(11); *see also* Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

141. In order to apply outside the United States, the federal statute must have extraterritorial jurisdiction. Examples of such statutes include: 18 U.S.C. § 32 (destruction of aircraft); *id.* § 112 (violence against internationally protected person); *id.* § 175 (prohibition against biological weapons); *id.* § 351 (congressional, cabinet, and supreme court assassination, kidnapping, and assault); *id.* § 793 (espionage); *id.* § 878 (threats, and other offenses, against internationally protected persons); *id.* § 1116 (murder or manslaughter of foreign official, official guests, or internationally protected persons); *id.* § 1119 (murder of U.S. national by other U.S. national); *id.* § 1203 (hostage taking); *id.* § 1512 (tampering with a witness, victim, or an informant); *id.* § 1751 (presidential and presidential staff assassination, kidnapping or assault); *id.* § 1001 (false and fraudulent statements); *id.* § 1956 (money laundering); *id.* § 2331 (extraterritorial jurisdiction over terrorist acts abroad against U.S. nationals); *id.* § 2401 (war crimes); *id.* § 46502 (aircraft piracy). Some federal statutes have inferred extraterritorial jurisdiction. *See, e.g.*, *id.* § 286 (conspiracy to defraud the government); *id.* § 287 (false, fictitious, or fraudulent claim against U.S.); *id.* § 844(f) (damage to government property); 21 U.S.C. §§ 841, 952, 960 (2000) (drug offenses).

142. The Act does not expand military jurisdiction over civilians.

143. 18 U.S.C. § 3261(a).

144. *Id.* § 3267.

145. *Id.* § 3261(d).

146. *Id.* § 3261(a). "Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7(3). It may be that any conduct that would be a federal crime regardless of where the conduct takes place in the United States, is covered. *See* Schmitt, *supra* note 139, at 3. Schmitt refers to the House Report for this conclusion; however, the language in the Act specifically states "if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 3261(a). Statutes applicable to the "special maritime and territorial jurisdiction of the United States" include: 15 U.S.C. §§ 1243, 1245 (2000) (manufacture, sale or possession of certain knives); 18 U.S.C. § 13 (Assimilative Crime Act, making state crimes federal offenses); *id.* § 81 (arson); *id.* § 113 (assault); *id.* § 114 (maiming); *id.* § 661 (theft); *id.* § 662 (receiving stolen property); *id.* § 831 (transactions involving nuclear materials); *id.* § 1025 (fraud on high seas); *id.* §§ 1111-1113 (homicides); *id.* § 1201 (kidnapping); *id.* § 1363 (damage to real property); *id.* § 1460 (obscene matter); *id.* § 1957 (racketeering activities); *id.* § 2111 (robbery); *id.* § 2119 (carjacking); *id.* §§ 2241-2244, 2252, 2252A (sex abuse); *id.* § 2261A (stalking); *id.* § 2318 (trafficking in certain counterfeited documents); *id.* § 2332b (certain terrorist acts); *id.* §§ 2422-2423 (coercion/enticement/transport of minor for sex).

recognized by the United States, has prosecuted or is prosecuting the person. Before the United States can prosecute the person for the same offense, there must be approval by the United States Attorney General or Deputy Attorney General.[147] Another limitation has to do with service members. Military members subject to the UCMJ will not be prosecuted under this Act, unless the member ceases to be subject to the UCMJ, or the indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.[148]

How does it work? Basically, a federal magistrate judge will conduct an initial appearance proceeding, which may be carried out by telephone or other voice communication means to determine if there is probable cause to believe a crime was committed and that the person committed it.[149] The federal magistrate judge will also determine the conditions of release if government counsel does not make a motion seeking pretrial detention.[150] If pretrial detention is an issue, the federal magistrate judge will also conduct any detention hearing required under federal law, which *at the request of the person* may be carried out overseas by telephonic means, and may include any counsel representing the person.[151]

How will this affect the military? This Act directly involves the military in two general areas. First, the Act (depending on implementing legislation) could authorize all DOD law enforcement personnel to arrest (based upon probable cause of commission of an offense covered by this Act) any persons to which this Act applies.[152] And second, the Act entitles the person to representation by a judge advocate at the initial proceeding conducted outside the United States, if the federal magistrate judge so determines.[153] The Secretary of Defense, after consultation with the Secretary of State and Attorney General, is responsible for prescribing regulations governing apprehension, detention, delivery and removal of persons to the U.S.[154]

Until the implementing regulations are in effect, many questions remain to be answered. What time constraints will apply? How familiar with the Federal Rules will the judge advocates involved need to be? Where are arrested civilians to be turned over? Who pays for the costs associated with the processing and transportation of arrested civlians? Now that the Act is in effect, what happens if it is needed before the implementing regulations are in place? What about offenses that occur before the effective date of the Act?[155] Even after the regulations are in place there will undoubtedly be questions. Does the Act apply to retirees and reservists when they commit an offense while in a military status but leave that status before apprehension?[156] What happens if the conduct is not a violation of federal law within the special maritime and territorial jurisdiction of the United States, but still violates some other federal law?[157]

Conclusion

This past year may not have been "the year of jurisdiction." However, several significant decisions were handed down, the aftershocks of *Goldsmith* reverberated through the appellate courts, and the MEJA was signed into law. All in all, it was an exciting time in the area of jurisdiction. But there remain questions still unanswered, and the jurisdictional landscape in the military continues to change, albeit slowly. With the implementing regulations for the MEJA to look forward to, this next year promises to be another exciting one . . . and just may be one that becomes known as "The Year of Jurisdiction."

147. 18 U.S.C. § 3261(b).

148. *Id.* § 3261(d).

149. *Id.* § 3265(a).

150. *Id.*

151. *Id.* § 3265(b).

152. *Id.* § 3262. The person arrested would then be turned over "as soon as practicable" to United States civilian law enforcement officials. *Id.*

153. *Id.* § 3265(c).

154. *Id.* § 3266. The regulations will not take effect until ninety days after a report containing such regulations, to be uniform throughout the DOD, are submitted to Senate and House Judiciary Committees. *Id.*

155. At least one Federal Circuit Court of Appeals has held that military bases and leased housing overseas falls within the special maritime and territorial jurisdiction of the United States and finds the federal government has jurisdiction. *See* United States v. Corey, 232 F. 3d 1166 (9th Cir. 2000). *But see* United States v. Gatlin, 216 F. 3d 207 (2d Cir. 2000) (holding that military installation overseas did not fall within the special maritime and territorial jurisdiction of the United States). The MEJA renders this issue immaterial in the future.

156. The plain language of the Act seems to leave room for the argument that a reservist or retiree would have to be involuntarily recalled to active duty under Article 2(d)(1), UCMJ, and could not be prosecuted under the Act. *See id.* § 3261(d). However, another interpretation is that the Act allows the government to prosecute a reservist in federal court without having to go through the recall process. *See* Schmitt, *supra* note 139, at 4.

157. *See supra* note 146 and accompanying text.